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VIA HAND DELIVERY, FED-EX, AND E-MAIL (larry.goldzband@bcdcc.ca.gov)

Lawrence Goldzband
Executive Director
San Francisco Bay Conservation and Development Commission
455 Golden Gate Avenue
Suite 10600
San Francisco, CA 94102

Re: *In Re: Mark Sanders and Westpoint Harbor, LLC*; BCDC Enforcement
Investigation No. ER2010.013

Dear Mr. Goldzband:

The following objections are asserted in response to:

- (1) the Deposition Subpoena for Production of Business Records, dated July 26, 2017, captioned *In Re: Mark Sanders and Westpoint Harbor, LLC*, regarding *BCDC Enforcement Investigation No. ER2010.013*, issued to Mark Sanders, and served on July 28, 2017 (the "Sanders Subpoena");
- (2) the Deposition Subpoena for Production of Business Records, dated July 26, 2017, captioned *In Re: Mark Sanders and Westpoint Harbor, LLC*, regarding *BCDC Enforcement Investigation No. ER2010.013*, issued to the Custodian of Records, Westpoint Harbor, LLC, 1529 Seaport Blvd., Redwood City, CA 94063, and served on July 28, 2017 (the "Westpoint Harbor Subpoena"); and
- (3) the Interrogatories, dated July 26, 2017, captioned *In Re: Mark Sanders and Westpoint Harbor, LLC BCDC Enforcement Investigation No. ER2010.013*, promulgated to Respondent Mark Sanders, and served on July 28, 2017 (the "Interrogatories").

According to the face of the documents, the Sanders Subpoena¹ and the Westpoint Harbor Subpoena² (together, the "Subpoenas") were issued pursuant to Section 11181(e) of the

¹ Attachment A.

² Attachment B.

California Government Code, and the Interrogatories³ were promulgated pursuant to Section 11181(f) of the California Government Code. In relevant part, Section 11181 states:

In connection with any investigation or action authorized by this article, the department head may do any of the following: [. . .]
(e) Issue subpoenas for [. . .] the production of papers, books, accounts, documents, [and] any writing as defined by Section 250 of the Evidence Code [. . .] *pertinent or material* to any inquiry, investigation, hearing, proceeding, or action conducted in any part of the state. (f) Promulgate interrogatories *pertinent or material* to any inquiry, investigation, hearing, proceeding, or action.⁴

The Subpoenas and Interrogatories were issued and promulgated in connection with San Francisco Bay Conservation and Development Commission ("BCDC") Enforcement Investigation No. ER2010.013 (the "Investigation"). On the face of the documents, the Subpoenas and Interrogatories relate only to the Investigation. However, the objections stated here assume, without conceding, that the Subpoenas and Interrogatories also relate to BCDC Violation Report/Complaint No. ER2010.013 mailed July 24, 2017 (the "VR/C"). The VR/C alleges violations of the BCDC permit issued for Westpoint Harbor (Permit No. 2002.002) and the McAteer-Petris Act. The VR/C contains no allegations whatsoever that bear on Mark Sanders' or Westpoint Harbor's finances. However, the Subpoenas and the Interrogatories do not seek information regarding any issues *other than* Mark Sanders' or Westpoint Harbor's finances, income, property holdings, assets liabilities, and net worth.

On the bases discussed below, Mark Sanders and Westpoint Harbor, LLC ("Respondents") object to each and every demand for production of records included in the Subpoenas. Respondents also object to each and every interrogatory propounded in the Interrogatories. Respondents object to the Subpoenas and Interrogatories because BCDC does not have authority to issue the Subpoenas or Interrogatories (nor does BCDC's Executive Director or BCDC's Chief Counsel have such authority). Authority for the Subpoenas and Interrogatories does not exist under Section 11181 of the California Government Code. Additionally, Respondents object to the Subpoenas and Interrogatories because they are irrelevant to the Investigation and the VR/C. Furthermore, Respondents object to the Subpoenas and Interrogatories as overbroad, unduly burdensome, not proportional to the needs of the Investigation and the VR/C, unreasonably cumulative, harassing, violative of the privilege protecting against disclosure of tax returns, violative of Respondents' Fourth Amendment rights under the U.S. Constitution, and violative of Mark Sanders' fundamental right to privacy guaranteed by the California Constitution. Moreover, Respondents object to the Subpoenas because they were not regularly issued and do not contain all proper information required for Respondents to respond. The objections asserted here are not exclusive, are not intended to waive any objections not expressly identified here, and are asserted without prejudice to

³ Attachment C.

⁴ Emphases added.

Respondents' rights to assert other appropriate objections in any proceeding brought pursuant to Section 11187 of the California Government Code.⁵

I. The information sought through the Subpoenas and Interrogatories is irrelevant to the Investigation and the VR/C, and issuance of the Subpoenas and Interrogatories is not authorized.

Investigative subpoenas and interrogatories served by BCDC in the course of its investigations must conform to legal and constitutional standards.⁶ Here, the Subpoenas and Interrogatories do not so conform. The authority to issue investigative subpoenas and interrogatories specifies that such subpoenas and interrogatories must be "pertinent or material to any inquiry, investigation, hearing, proceeding, or action[.]"⁷ As noted above, the Investigation concerns, and the VR/C pertains to, alleged violations of the BCDC Permit No. 2002.002 and the McAteer-Petris Act. There are no allegations whatsoever that bear on the subject matter of the Subpoenas and Interrogatories (i.e., Mark Sanders' or Westpoint Harbor's finances). Thus, the Subpoenas and Interrogatories seek information that is irrelevant to the Investigation and the VR/C. Given this irrelevance, by definition, the information sought is not "pertinent or material to" the Investigation and the VR/C, and issuance of the Subpoenas and Interrogatories is beyond BCDC's power.

To the extent that BCDC invokes Section 66641.9 of the California Government Code as a basis for issuing the Subpoenas and Interrogatories, such invocation is inappropriate. Section 66641.9 specifies considerations taken into account in determining the amount of administrative civil penalties assessed by BCDC, including a violator's ability to pay. However, Respondents have not asserted inability to pay a penalty as a defense to the Investigation or the VR/C. Given that ability to pay is not in issue, Section 66641.9 does not provide a basis for asserting that the information sought through the Subpoenas and Interrogatories is relevant to the Investigation or the VR/C.

II. The Subpoenas and Interrogatories are overbroad, unduly burdensome, not proportional to the needs of the Investigation and the VR/C, unreasonably cumulative, and harassing.

Given the irrelevance of the information sought, the Subpoenas and Interrogatories are overbroad, unduly burdensome, not proportional to the needs of the Investigation and the VR/C, unreasonably cumulative, and harassing. In addition, even if the information sought were relevant to the Investigation or the VR/C, the Subpoenas and Interrogatories are objectionable on these grounds.

⁵ See 64 Ops. Cal. Atty. Gen. 291, 10 (1981) (concluding, based on a review of case law, that a defense to enforcement of an administrative subpoena may be asserted for the first time in a judicial proceeding brought under California Government Code Section 11187 to compel production).

⁶ *People ex rel. Franchise Tax Bd. v. Superior Court*, 164 Cal. App. 3d 526, 539 (Cal. Ct. App. 1985).

⁷ Cal. Gov't Code § 11181(f).

The Sanders Subpoena demands a huge volume of document production. Specifically, it demands production of the “federal income tax return, including all schedules, for Mark Sanders,” for calendar years 2015 and 2016, as well as “[a]ny documents created or dated on or after December 31, 2015 identifying the assets (whether separate property, community property, or held in a trust), liabilities, or net worth of Mark Sanders.”⁸ The scope of these demands is extremely broad and, by its plain terms, encompasses potentially thousands of pages of documents. For example, “[a]ny documents created or dated on or after December 31, 2015” identifying assets, liabilities, or net worth would capture nearly every page of every bank statement, brokerage account statement, real or personal property receipt, and financial statement created or dated since December 31, 2015. There is no plausible reason that such quantity of information and such level of detail is needed to assess Respondents’ ability to pay administrative penalties. Compiling and producing every document that identifies assets, liabilities, or net worth would be a significant burden that is not justified by any BCDC need or legitimate investigative desire. Furthermore, much of the information on any one document concerning assets, liabilities, or net worth would likely be cumulative of other documents and of information responsive to the Interrogatories (discussed below).

Assessment of ability to pay does not require identification of each and every specific asset and liability of Respondents. Documents identifying specific assets and liabilities, and income tax returns from 2015 and 2016 could not even provide a picture of total net worth, and thus are only tangentially related, at best, to Respondents’ ability to pay administrative penalties. There’s only one logical explanation for such broad, burdensome, disproportionate, and unreasonably cumulative demands for information: the Subpoenas and Interrogatories were issued in an effort to harass Respondents.

Like the Sanders Subpoena, the Westpoint Harbor Subpoena demands an unreasonable amount of information and supports only one conclusion regarding BCDC’s motives: the Subpoenas and Interrogatories are an effort to harass Respondents. The Westpoint Harbor Subpoena demands “[a]ll year-end financial statements (including, but not limited to balance sheets, statements of financial position, statements or reports of the company’s assets, liabilities, and owner’s equity)” for 2015 and 2016. The Westpoint Harbor Subpoena also demands the “Federal tax returns, including all schedules” for 2015 and 2016. Again, there is no plausible reason that such quantity of information and such level of detail is needed to assess Respondents’ ability to pay administrative penalties. For the same reasons as stated above concerning the Sanders Subpoena, the Westpoint Harbor Subpoena is overbroad, unduly burdensome, not proportional to the needs of the Investigation and the VR/C, unreasonably cumulative, and harassing.

⁸ Emphasis added.

The Interrogatories also seek a vast amount of financial information about Mark Sanders. The Interrogatories demand that Mr. Sanders identify:

all real property you own (whether as separate property, community property, or held in a trust), and state the current estimated fair market value of each property[;]

all stocks and bonds you own (whether as separate property, community property, or held in a trust), and state the current estimated value of all such stocks and bonds respectively[;]

all mutual fund accounts and exchange-traded fund accounts you own (whether as separate property, community property, or held in a trust), and state the estimated value of each mutual fund account and exchange-traded fund account as of June 30, 2017[; and]

all savings or other financial accounts you own (whether as separate property, community property, or held in a trust), [. . .] and state the estimated value of each savings or other financial account as of June 30, 2017.

Not only are these Interrogatories cumulative of the Sanders Subpoena, they are also as egregiously broad. BCDC is not the U.S. Securities and Exchange Commission. BCDC is not conducting any legally permissible investigation into Mark Sanders' stock holdings, or real property ownership, or mutual fund accounts. There is simply no reasonable basis for claiming that BCDC's legitimate scope of investigation could possibly extend to whether Mr. Sanders owns 10 shares of Apple, 15 shares of General Electric, or zero shares of either of those companies. And, yet, the Interrogatories demand that Mr. Sanders "identify all stocks and bonds you own[.]" Again, there is only one explanation for the issuance of the Subpoenas and the Interrogatories: harassment.

As noted above, the information sought through the Subpoenas and Interrogatories is not at all relevant to BCDC's Investigation or VR/C, as financial inability to pay administrative penalties has not been asserted by Respondents. But, even if Respondents had put financial inability to pay at issue, the Subpoenas and Interrogatories grossly exceed any legitimate scope of BCDC inquiry.

III. The Subpoenas demand documents in violation of the privileged protecting against disclosure of tax returns under California and federal law.

Under California law, there exists a judicially created privilege that prohibits "forcing a taxpayer to produce a copy of his state or federal income tax returns in litigation[.]"⁹ Federal law

⁹ *King v. Mobile Home Rent Review Bd.*, 216 Cal. App. 3d 1532, 1537, 265 Cal. Rptr. 624 (Ct. App. 1989).

contains a similar privilege.¹⁰ The privilege extends to administrative proceedings.¹¹ There are limited exceptions to the privilege when (1) there is intentional relinquishment or waiver of the privilege, or (2) a public policy is involved which is greater than that of confidentiality of tax returns.¹² However, neither exception applies here, and the Subpoenas seek information in violation of the privilege. Even assuming that BCDC could make a valid argument that tax returns were relevant to the Investigation or the VR/C (which argument cannot actually be validly made), such an argument would not overcome the privilege. In a case that involved a governmental entity's review of an application that directly required assessment of the applicant's financial condition and the ability of the applicant to make "a reasonable return on his property[.]" the court held that the privileged prohibited the governmental entity from demanding income tax returns.¹³ The fact that the Subpoenas were issued, demanding production of federal income tax returns, despite the long-standing privilege that protects against disclosure of tax returns shows the true intent behind the Subpoenas and Interrogatories: harassment.

IV. The Subpoenas and Interrogatories violate Respondents' Fourth Amendment rights under the U.S. Constitution.

Respondents object to the Subpoenas and Interrogatories as blatant violations of the Fourth Amendment of the U.S. Constitution. In applying the Fourth Amendment protections, the inquiries are whether BCDC's demand for information is authorized and whether "the demand be not too indefinite, and that the information sought be reasonably relevant."¹⁴ As detailed above, the Subpoenas and Interrogatories seek a vast amount of information, well beyond the scope of the Investigation and the VR/C. The information sought must be reasonably relevant.¹⁵ Here, it is not.

V. The Sanders Subpoena and the Interrogatories violate Mark Sanders' fundamental right to privacy guaranteed by the California Constitution.

The Sanders Subpoena and Interrogatories contravene Mark Sanders' fundamental right to privacy guaranteed by the California Constitution. Requiring the production of documents and information that delve into the depths of Mr. Sanders' personal finances and personal property interests undoubtedly encroaches upon his "personal freedom and security" and effectively amounts to a form of state surveillance of Mr. Sanders' life without any apparent benefit to BCDC in its investigation of the alleged violations of Permit No. 2002.002 and the McAteer-Petris Act.

¹⁰ See, e.g., *Premium Serv. Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225, 229 (9th Cir. 1975).

¹¹ *King*, 216 Cal. App. 3d at 1537.

¹² *Id.*

¹³ *Id.*

¹⁴ *Franchise Tax* at 539 (quoting *Brovelli v. Superior Court of Los Angeles Cty.*, 56 Cal. 2d 524, 529 (Cal. 1961)).

¹⁵ *Union Pac. R. Co. v. State Bd. of Equalization*, 237 Cal. Rptr. 440, 443 (Cal. Ct. App. 1987).

To overcome Mr. Sanders' constitutional right to privacy, BCDC must demonstrate a compelling governmental interest and that the information sought by BCDC cannot be obtained by other, less intrusive means. For a California court to find an administrative agency, like BCDC, has "good cause" for requesting documents or materials, the agency must establish that the investigative demand is particularized and narrowly focused as to require production only of evidence that is relevant and material to the agency's legitimate concerns. The Sanders Subpoena and Interrogatories are not particularized or narrowly focused, and they do not demand production of relevant and material evidence. Again, in summary, the Sanders Subpoena and Interrogatories call for "all real property you own," "all stocks and bonds you own," "all mutual funds accounts and exchange-traded fund accounts you own," "all savings or other financial accounts you own," Mr. Sanders' 2015 and 2016 federal income tax returns, and any documents from 12/31/2015 to present that identify Mr. Sanders' assets, liabilities, and net worth. The detailed personal financial information sought by BCDC is not, and cannot be, supported by a sufficient "good cause" showing that justifies abridgment of Mr. Sanders' right to privacy. There is no doubt that in turning over all of the materials requested, Mr. Sanders' "personal and objectively reasonable expectation of privacy" would be entirely infringed upon by unnecessary governmental intrusion. That would violate his constitutional right of privacy.

VI. The Subpoenas were not regularly issued and do not contain all proper information required for Respondents to respond.

The harassment that BCDC has perpetrated in the form of the Subpoenas does not even comply with basic requirements governing deposition subpoenas for production of business records.¹⁶ Neither the Sanders Subpoena nor the Westpoint Harbor Subpoena state the name of the deposition officer to whom business records would be produced. Given this facial deficiency, compliance with the Subpoenas is not required and is not possible. Among other things, the law requires that the deposition officer "shall be a professional photocopier registered under Chapter 20 [. . .] of the Business and Professions Code, or a person exempted from the registration requirements of that chapter under Section 22451 of the Business and Professions Code."¹⁷ Additionally, the law provides that the deponent may object to the qualifications of the deposition officer.¹⁸ Respondents object to the Subpoenas and to the qualifications of the deposition officers on the basis that no deposition officers are named.

VII. Conclusion

For the reasons stated above, Respondents object to the Subpoenas and Interrogatories. As noted, these objections are not exclusive, are not intended to waive any objections not expressly identified, and are asserted without prejudice to Respondents' rights to assert other appropriate objections.

¹⁶ See Cal. Code of Civ. Proc. §§ 2020.410-2020.440.

¹⁷ *Id.* § 2020.420.

¹⁸ *Id.*

BAKER BOTTS LLP

Lawrence Goldzband

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August 25, 2017

Sincerely,

A handwritten signature in black ink, appearing to read "Christopher J. Carr", with a stylized flourish at the end.

Christopher J. Carr

cc: Marc A Zeppetello, Esq. (via email marc.zeppetello@bcd.ca.gov)